(8)

No. 95-1184

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE IN SUPPORT OF PETITIONER

CURTIS M. ANDERSON
NATIONAL ASSOCIATION OF STATE
DEPARTMENTS OF AGRICULTURE
1156 15th Street, N.W.
Suite 1020
Washington, D.C. 20005-1704
(202) 296-9680
Counsel of Record
for Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Association of State Departments of Agriculture (NASDA) hereby respectfully moves for leave to file the attached brief of *amicus curiae* in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondents was requested but not given.

The interest of NASDA in this case arises from the fact that its members are the Departments of Agriculture of all 50 states plus the territories of Guam, American Samoa, Puerto Rico, and the Virgin Islands. The vast majority of these are directly involved in the operation of commodity promotion and research programs similar to those at issue in this case. NASDA members are routinely called upon in carrying out their statutory man-

dates to advise these programs as well as provide guidance to state legislators seeking to authorize new programs. Significantly, NASDA members have been named as party defendants in litigation involving the same issues raised in this case. *Bidart Bros. v. California Apple Comm'n*, No. CV-F-94-0618-OWW (E.D. Cal.); *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Comm'n*, No. CV-F-95-5428-OWW (E.D. Cal.); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, No. CV-S-96-102 EJG (E.D. Cal. filed January 17, 1996).

In the instant case in the Court of Appeals, the argument focused exclusively on commodity research and promotion programs operating under federal law. The amicus believes there is a significant potential for this case to unreasonably interfere with states' abilities to carry out long-standing statutory mandates to preserve, protect and enhance their argicultural economies. NASDA members are uniquely well suited to bring this aspect of this case to the Court's attention and thereby underscore the need for Supreme Court review.

Respectfully submitted,

CURTIS M. ANDERSON
NATIONAL ASSOCIATION OF STATE
DEPARTMENTS OF AGRICULTURE
1156 15th Street, N.W.
Suite 1020
Washington, D.C. 20005-1704
(202) 296-9680
Counsel of Record
for Amicus Curiae

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE IN SUPPORT OF PETITIONER

This brief is presented on behalf of the National Association of State Departments of Agriculture (NASDA) in support of the Petition for a Writ of Certiorari filed by the Solicitor General of the United States on January 24, 1996. It is presented with the consent of the attorney for Petitioner. The consent of the attorney for the Respondents was requested but not given.

INTEREST OF THE *AMICUS CURIAE*

The *amicus*, the National Association of State Departments of Agriculture (NASDA), is a non-profit association whose members are state agencies charged with the

responsibility, among others, of promoting, protecting and preserving their states' agricultural wealth. NASDA includes departments from all 50 states and the territories of Guam, American Samoa, Puerto Rico and the Virgin Islands and represents their interests on issues of national concern. NASDA also provides a forum for the free exchange of ideas among its members and acts as a national clearing house for information of interest to them.

The vast majority of NASDA members oversee the activities and work cooperatively with at least one commodity promotion and research program similar to those at issue in *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995). Forty-three states operate legislatively authorized commodity promotion and research programs. O.D. Forker and R.W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs*, Lexington Books (1993) 140-141, Table 5-16.

In these states, NASDA members work regularly with the legislators who authorize these programs and the producers who implement the programs and then guide their policies and activities. It is not surprising, therefore, that NASDA members are seeing first hand the daily impacts of the uncertainty created by the *Wileman* decision. Accordingly, they are particularly well suited to communicate this aspect of the *Wileman* case.

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of the case in Petitioner's brief.

ARGUMENT

The Ninth Circuit erred in deciding *Wileman*. In declaring the promotion activities of federal marketing orders for California-grown peaches and nectarines to be unconstitutional, the Ninth Circuit inappropriately relied upon the standard articulated in *Central Hudson Gas and*

Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980). Even if somehow the *Central Hudson* standard is appropriate, the Ninth Circuit applied the test in a fashion which is wholly inconsistent with this Court's jurisprudence.

The decision in *Wileman* has thrown nearly six decades of state agricultural policy into disarray. The production and marketing of agricultural commodities is the bedrock upon which many state economies are built. The agricultural industry provides stable tax revenues, enhances the quality of life in rural communities, creates significant employment opportunities and produces an abundant supply of high quality food and fiber for the nation and the world.

The well-being of this segment of state economies is increasingly challenged by declining federal support and growing competition in the global marketplace. Accordingly, the continuation of commodity promotion and research programs is critical to state efforts to preserve, promote and enhance the agricultural segment of their economies.

The Ninth Circuit decision has left the states wondering what their existing programs can and cannot do and has cast serious doubt upon the ability to create new programs where necessary. Finally, it raises doubt as to whether there remains after *Wileman* any way for a state to advance what even the Ninth Circuit concedes to be a substantial governmental interest. See, *Cal-Almond, Inc. v. USDA*, 14 F.3d 429, 437 (9th Cir. 1993).

Since the mid-1930's states have enacted laws authorizing agricultural producers to engage in collective self-help programs to stabilize agricultural industries and to increase consumer acceptance of various commodities. The Solicitor General has set forth some of the statutory schemes existing within the Ninth Circuit at page 19 of

the Petition. There are, however, numerous statutorily authorized programs operating in states beyond that Court's jurisdictional boundaries. See, e.g., Chapter 573 (commencing with Section 573.101), Florida Statutes Annotated (Harrison, 1992); Sections 290.651, et seq., Michigan Compiled Laws, Annotated (West, 1984); Chapter 104 (commencing with Section 104.001) of Texas Agric. Code Annotated (Vernon, 1995) and Article 25 (commencing with Section 292) of New York Agric. & Mkts. Law (McKinney, 1991).

In the wake of the *Wileman* decision, the challenges to these programs and the accompanying uncertainty have expanded beyond the boundaries of the Ninth Circuit as well. As noted by the Solicitor General, the National Beef Promotion and Research Act (7 U.S.C. § 2901, et seq.) has been challenged in the District of Kansas (*Goetz v. Espy*, No. 94-1299 (D.Kansas filed August 2, 1994). Additionally, two state-authorized programs for cherries have been challenged in the Western District of Michigan (*Dukesherer Farms, Inc. v. Michigan Cherry Committee*, No. 1-95-CV-742 (W.D.Mich. filed October 19, 1995)). The spread of these challenges is causing considerable confusion which is significantly interfering with NASDA members' ability to effectively and efficiently carry out their statutory mandates.

As advisors to the more than 200 state-authorized programs currently operating in the United States, NASDA members are often called upon to assist programs in determining what they can and cannot do within the bounds of their statutory authority and other laws. The *Wileman* decision has made this role nearly impossible because the "test" articulated by the Ninth Circuit offers no guidance as to how a program should conduct itself to avoid impermissible constitutional infringement.

NASDA members and the programs they advise are left to speculate that perhaps what the Ninth Circuit has said through its *Wileman* decision is that before a program can act, it must go through an incredibly convoluted, time-consuming and practically impossible exercise. First, it appears a program must attempt to forecast the impacts of its planned activities. Next, it must endeavor to evaluate all possible factors impacting the marketplace, predicting both the type and magnitude of the impact. Third, the program must attempt to anticipate every conceivable promotional activity that could possibly be undertaken by any individual within the affected industry and estimate the effectiveness of those efforts. Finally, the program must compare its own forecast of effectiveness to every possible individual activity (and perhaps every possible combination of those activities), taking into account the myriad of forces affecting the market, including many which are beyond anyone's control.

It appears that only after engaging in this exercise and concluding that every possible program activity will be more efficacious than every possible individual effort in every possible set of circumstances can a program be reasonably certain of withstanding scrutiny under the *Wileman* "standard." Obviously, such an exercise is for all practical purposes impossible. Even if it were feasible, the costs in time and personnel resources would put it beyond the reach of nearly every segment of the agricultural industry. Logic dictates that this simply cannot be the standard.

NASDA members are also frequently looked to for guidance by state legislators seeking advice regarding agricultural issues, including the enactment of statutes authorizing new commodity promotion and research programs. Here, too, the questions left unanswered by the Ninth Circuit are significantly interfering with statutorily mandated functions.

Despite the discussion of the three-part *Central Hudson* test, the *Wileman* decision rests almost entirely on the "comparative efficacy" analysis used by the Ninth Cir-

cuit to determine whether the program directly advances the government interest. *Wileman, supra,* 58 F.3d at 1379. Accordingly, it appears that a fundamental piece of evidence that must be presented in any future attempt to satisfy the *Wileman* "standard" would be a record of past accomplishments demonstrating the effectiveness of a program's activities. In light of this, NASDA members can only guess as to whether or how any new program could possibly survive this analysis.

Any new program a state legislature may authorize in order to advance substantial and arguably compelling (see, *U.S. v. Frame,* 885 F.2d 1119, 1134 (3d Cir. 1989)) state interests will obviously begin its life with no track record. If challenged early in its existence, it will face the same "Catch-22" so familiar to new job seekers who cannot find a job because they have no experience and are unable to gain any experience because they cannot find a job. Similarly, a new program may not survive the *Wileman* "standard" because it has no track record. At the same time, it will be denied the opportunity to develop a track record because it cannot pass the *Wileman* "standard."

NASDA members are left wondering: Did the Ninth Circuit mean there can be no new programs? If so, it seems strange to have apparently "grandfathered" certain existing programs while barring the door to new ones. Further, it seems inconceivable that the Ninth Circuit would by implication deny states this decades old mechanism for advancing what even that Court agrees is an important interest. Again, logic and common sense lead inescapably to the conclusion that the "standard" articulated in the *Wileman* case cannot be that by which these important state programs are to be judged.

CONCLUSION

Based on the foregoing, it can be seen that the erroneous decision of the Ninth Circuit in *Wileman* is significantly interfering with the orderly conduct of vital state programs. The decision has cast a pall over nearly sixty years of state effort to advance substantial interests in the preservation of the agricultural segments of their economies. This unreasonable interference is the direct result of the inappropriate application of the *Central Hudson* standard by the Ninth Circuit and is disrupting state programs throughout the country. For these reasons, NASDA, on behalf of its members, respectfully requests this Court to grant the U.S. Solicitor General's Petition for Writ of Certiorari.

Respectfully submitted,

CURTIS M. ANDERSON
NATIONAL ASSOCIATION OF STATE
DEPARTMENTS OF AGRICULTURE
1156 15th Street, N.W.
Suite 1020
Washington, D.C. 20005-1704
(202) 296-9680
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for Amicus Curiae